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Heidi Li Feldman

*Georgetown University Law Center*, [feldmanh@georgetown.edu](mailto:feldmanh@georgetown.edu)

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## Why the Latest Ruling in the Sandy Hook Shooting Litigation Matters

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by Heidi Li Feldman

Last week the Connecticut Supreme Court issued a decision in the ongoing litigation brought by plaintiffs representing the twenty children and six adults shot dead in 2012 at Sandy Hook Elementary School in Newtown. The shooter carried a Bushmaster semiautomatic assault-style weapon. The Sandy Hook plaintiffs have been trying for years to bring claims against the Bushmaster's manufacturer, Remington, and the distributor and retailer of the particular gun used in the shooting. Their road to trial has been arduous because of the Protection of Lawful Commerce in Arms Act (PLCAA), a federal statute that gives a remarkable degree of protection against civil liability to gun makers and sellers when the products they make and sell are used by criminal shooters. Because the Connecticut Supreme Court's decision greenlights civil discovery and trial, its ruling in *Soto v. Bushmaster Firearms International, LLC* received much attention in the popular press. It is, however, very easy to get the wrong impression about the significance of the Connecticut Supreme Court's decision and the avenues it creates for both the plaintiffs and the defendants in the litigation. The decision is both more and less significant than it seems at first glance. It opens a serious pathway to liability under the PLCAA and creates a strategic dilemma for the defendant as to whether to appeal or go to trial. Yet the PLCAA remains a bar to most types of civil action to which other product makers and sellers are subject. In the absence of comprehensive congressional regulation, it will remain difficult to require or motivate gun makers to enhance the safety of firearms design and distribution.

In a meticulous, extensive opinion, the Connecticut Supreme Court held that, despite the PLCAA's broad protections from civil liability for the gun industry, the plaintiffs stated a cause of action under the PLCAA itself. The Sandy Hook plaintiffs argued that Remington (manufacturer), Camfour (distributor), and Riverview Sales (retailer) violated a state statute applicable to the sale or marketing of the Bushmaster rifle, thereby proximately causing the deaths and injuries at Sandy Hook. The state statute in question is the Connecticut Unfair Trade Practices Act (CUTPA), a very general statute with various applications. The Sandy Hook plaintiffs claimed that the defendants intentionally marketed and advertised the Bushmaster rifle as a weapon for criminal use, thereby engaging in an "unethical, oppressive, immoral, and unscrupulous" business practice that violated the CUTPA. The logic of the Connecticut Supreme Court ruling was: the PLCAA explicitly permits civil causes of action premised on the violation of a state statute applicable to the sale and marketing of firearms; CUTPA applies to firearms makers and sellers; a jury could conclude that Remington, Camfour and Riverview had engaged in immoral business practices in violation of CUTPA; and these illegal practices proximately caused the plaintiffs' losses.

Barring a request for reconsideration by the Connecticut Supreme Court, the defendants may seek a writ of certiorari from the U.S. Supreme Court, asking it to assess the Connecticut Court's interpretation of the PLCAA. If the U.S. Supreme Court were to take the case, it might reverse the Connecticut Supreme Court's ruling that the CUTPA can serve as the sort of statute whose violation opens gun makers and sellers to civil liability. Nevertheless, as of this writing, the Sandy Hook plaintiffs can proceed with civil discovery to pursue evidence to persuade a jury that Remington's, Camfour's and Riverview's marketing and advertising practices violated the CUTPA, proximately causing the deaths and injuries at Sandy Hook. This is the most immediate, concrete impact of the new ruling. Yet even assuming the Sandy Hook plaintiffs ultimately prevail at trial and on any post-trial appeals, it might seem as though a single ruling in a single gun case is still a small development from a systemic point of view. But this assessment underestimates the potential influence of the Connecticut Supreme Court's decision.

To appreciate the wider import of the latest decision in the Sandy Hook litigation requires understanding the nature and extent of statutes like the CUTPA. The CUTPA is an unfair and deceptive

acts and practices statute (UDAP) with counterparts in other U.S. jurisdictions. Many of these counterparts, like the CUTPA itself, create rights and remedies not only for individual victims of gun violence but also for states and municipalities.

As in Connecticut, many, though not all, jurisdictions interpret their UDAP statutes as prohibiting unfair or unconscionable business practices. In many places, UDAPs not only create private causes of action in which prevailing plaintiffs can recover attorneys fees, they also permit the state attorney general or other state consumer protection officers to seek a wide range of remedies, including bringing suit for damages, declaratory and injunctive relief. State unfair trade practices statutes also generally create investigative processes that can be set in motion independently of and prior to any litigation. Despite variation in state unfair trade practice statutes, they are tools of the trade for state attorneys general, officials with a long history of ensuring consumer protection. Current UDAPs generally date to the late 1960s and 1970s. They arose from that era's consumer protection movement and were supported by state attorneys general like Walter Mondale in Minnesota.

Were state attorneys general to use their own CUTPA-like prohibitions on unfair and unconscionable advertising, they might succeed in prospectively enjoining the marketing of semiautomatic weapons based on their militaristic qualities, particularly their ability to very rapidly kill other people without much skill on the part of the shooter. To the extent that this sort of marketing proximately causes mass shootings in civilian settings, eliminating the marketing would, it follows, reduce mass shootings. Moreover, if the only way manufacturers can sell meaningful numbers of such weapons is via this sort of marketing, it is conceivable that prohibiting marketing might make it unprofitable to continue to manufacture semiautomatic weapons.

Additionally, the sort of investigation and discovery available to investigating authorities empowered by state UDAPs might reveal a broader range of illegal trade practices engaged in by gun makers and gun sellers, including some related to firearms other than semiautomatic assault style weapons. Revelations like these propelled the 1998 Master Settlement Agreement between states and cigarette manufacturers.

More serious scrutiny and regulation of gun makers' and sellers' trade practices, particularly those related to advertising and marketing, could have real impact on the popularity and availability of at least some kinds of firearms. That is the potentially major, broad, and systemic impact of the Connecticut Supreme Court's latest decision in the Sandy Hook litigation.

Highlighting the possible far-reaching implications of the decision throws into relief the strategic quandary now faced by Remington, Camfour, and Riverview. Gun manufacturers have fought hard to limit exceptions to the PLCAA precisely to forestall any examination of their internal documents and records. Thus, Remington and its codefendants fought vigorously to have the Sandy Hook claims dismissed on the pleadings, with no opportunity for civil discovery. This might suggest, as it has to some commentators, that the defendants will seek U.S. Supreme Court review of the Connecticut Court's treatment of the CUTPA's relationship to the PLCAA. But obtaining such review risks the possibility that the U.S. Supreme Court will definitively create a predicate exception to the general PLCAA protections from civil liability for gun manufacturers and sellers. Such a ruling would accelerate the scenario of many states, municipalities, and individuals pursuing gun industry actors through UDAP provisions. Of course, the gun industry could always turn back to Congress, seeking a restrictive amendment regarding the sort of statutes whose violation opens the door to civil recovery. But returning congressional attention to the PLCAA might itself bring consequences unwanted by the gun industry, ranging from the creation of further exceptions within PLCAA to repeal of the statute entirely. In any event, PLCAA amendment or repeal is a long way from last week's Connecticut Supreme Court decision. Even taking into account the somewhat more likely prospect of the decision opening the door to multistate efforts to affect how firearms are marketed and advertised, the effects of the decision are limited when compared to other ways to minimize excessive rates and types of gun injuries while still

ensuring their availability for legitimate and responsible use. Legislation banning the production and sale of assault-style semiautomatic weapons is one possibility. Legislation to encourage and even require more safely designed guns is another. Congress could even bring gun manufacturing under a regulatory framework more like the one governing automobile making, in which an administrative agency oversees constant improvement in the overall safety of the vehicles on our roads. Gun culture and politics in the U.S. complicates any effort at comprehensive legal attention to the design or the distribution of firearms. Against that background, even the relatively small crack in PLCAA protection forged by the Connecticut Supreme Court counts as a potential step toward protection from excessively lethal weapons.

Heidi Li Feldman

Georgetown University Law Center

Heidi Li Feldman is Professor of Law at Georgetown University Law Center, with a courtesy appointment in the Philosophy Department at Georgetown University. Her scholarly expertise includes torts, constitutional torts, products liability, legal theory, political philosophy, ethics, and epistemology. She...

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